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# In the Supreme Court of the United States

JOSEPH C. ROELL, PETRA GARIBAY, AND JAMES REAGAN,

*Petitioners,*

v.

JON MICHAEL WITHROW,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITIONERS' BRIEF

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## QUESTION PRESENTED

When a district court, upon the plaintiff's written consent, refers a case to a magistrate judge for trial, *see* 28 U.S.C. §636(c), and all parties, the magistrate judge, and the jury proceed in a manner consistent with that referral, must a court of appeals *sua sponte* vacate the judgment for lack of jurisdiction because defendants did not expressly consent before trial, or can defendants cure that alleged defect by confirming, in a post-judgment filing with the district court, their consent to trial before the magistrate judge?

## LIST OF PARTIES

The caption includes all parties to the Fifth Circuit appeal. *See* SUP. CT. R. 14.1(b). Petitioners note, however, that the Fifth Circuit caption lists a fourth "Defendant-Appellee," Jerry Ballard. Pet. App. 1a. Ballard was not a party in the Fifth Circuit.

Plaintiff Withrow's claims against Ballard were dismissed prior to service and, therefore, Ballard never appeared at trial or in the Fifth Circuit. *See* R.713, 809.[1] Accordingly, Petitioners do not list Ballard as a party "to the proceeding in the court whose judgment is sought to be reviewed." SUP. CT. R. 14.1(b).

[1] References to documents that are in the Fifth Circuit record, but not included in the Joint Appendix or Appendix to the Petition for Writ of Certiorari, will be designated "R.[page #]."



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## PETITIONERS' BRIEF

This case presents a question of statutory construction: whether a magistrate judge has authority under 28 U.S.C. §636(c) to preside over a jury trial and to direct entry of judgment when all parties voluntarily proceed before the magistrate judge and two defendants who neglected to file consent forms confirm their consent in a post-judgment filing with the district court. The Fifth Circuit erroneously held that §636(c) prohibits post-judgment consent and that the absence of express pretrial consent is a jurisdictional defect that cannot be waived. Such reasoning confuses magistrate judges' authority with subject-matter jurisdiction and interjects formalistic constraints on consent that are neither supported by the text of §636(c) nor the structure, purpose, and policy behind the Federal Magistrates Act. The Court should reverse the Fifth Circuit's judgment and hold that post-judgment confirmation of consent satisfies §636(c).

### OPINIONS AND ORDERS

The Fifth Circuit's opinion is reported as *Withrow v. Roell*, 288 F.3d 199 (CA5 2002). Pet. App. 1a. The Fifth Circuit's limited remand order is unreported. Pet. App. 12a. Also unreported are the district court's order on remand adopting the magistrate judge's report and recommendation on consent, Pet. App. 14a, and the report and recommendation itself. Pet. App. 16a. The magistrate judge's final judgment on the merits, which the Fifth Circuit vacated for lack of consent, is unreported. Pet. App. 28a.

## JURISDICTION

The Fifth Circuit issued its judgment and opinion on April 8, 2002. Joseph C. Roell, Petra Garibay, and James Reagan timely petitioned for writ of certiorari on July 8, 2002, *see* SUP. CT. R. 13.1, invoking the Court's jurisdiction under 28 U.S.C. §1254(1). The Court granted the petition for writ of certiorari on November 4, 2002. *Roell v. Withrow*, 123 S.Ct. 512 (2002).

## STATUTORY PROVISION INVOLVED

The complete text of 28 U.S.C. §636 is printed in the appendix to this brief.

## STATEMENT OF THE CASE

Jon Michael Withrow, an inmate in custody of the Texas Department of Criminal Justice (TDCJ), brought this *pro se* suit under 42 U.S.C. §1983 alleging that various TDCJ doctors and nurses were deliberately indifferent to his medical needs when he injured an ankle dismounting his cell bunk.

Prior to service on the TDCJ defendants, the district court referred Withrow's suit to a magistrate judge for an evidentiary "*Spears* hearing" to assess Withrow's claims. *See* J.A. 9-10.[2] A representative from the Attorney General's Office attended, as did Withrow. *Id.*

[2] The term "*Spears* hearing" comes from *Spears v. McCotter*, in which the Fifth Circuit approved the district-court practice of referring prisoner suits to magistrate judges, pursuant to 28 U.S.C. §636(b)(1), to identify frivolous suits that cannot be pursued *in forma pauperis* under 28 U.S.C. §1915 or suits that should be dismissed for failure to state a claim. 766 F.2d 179 (CA5 1985); *see also* R.809 (describing Withrow's *Spears* hearing and noting that 28 U.S.C. §1915A(b) provides for dismissal of prisoner suits that are frivolous, malicious, or fail to state a claim).



At the hearing, the magistrate judge informed Withrow that his case had been assigned to a United States District Judge. The magistrate judge explained that she was conducting the *Spears* hearing "to learn a little bit more about [his] claims," but that her power to act on the case was limited by law. J.A. 10. She added, however, that she could make all decisions in the case—including final decisions—if Withrow and the defendants provided consent. J.A. 10-11. The magistrate judge further explained that Withrow was not required to consent and that "[m]y feelings won't be hurt if you don't want to consent, but it will affect how I go about processing your case after today's hearing." J.A. 11. Withrow responded: "I would consent to have you remain as the judge." *Id.*

The magistrate judge next asked whether the assistant attorney general who attended the hearing would consent on behalf of the defendants. *Id.* Because the Attorney General's Office had not yet assigned counsel for the defendants—who had not yet been served—the attorney attending the hearing explained that she "would not be able to consent at this time, but the attorneys that will be assigned will be able to make that decision." *Id.* The magistrate judge asked the attorney to provide a consent form to Withrow and to inquire, upon returning to the Attorney General's Office, whether the persons designated to defend the TDCJ defendants would execute consent

forms. *Id.* The assistant attorney general responded, "Yes, Your Honor, I'll do that." *Id.*

Following the *Spears* hearing, but still prior to service on any of the defendants, Withrow filed written consent to proceed before a magistrate judge pursuant to 28 U.S.C. §636(c). Pet. App. 20a.[3] The form indicated Withrow's waiver of his right to proceed before a district judge and confirmed the magistrate judge's authority to conduct "all further proceedings," including a jury trial and entry of judgment. *Id.*

After Withrow filed his written consent, the district judge referred the action to a magistrate judge for all purposes, including trial and entry of final judgment. Pet. App. 21a. The order noted, however, that the reference would be vacated if any of the defendants, upon service, did not consent. *Id.*

After being served and answering, Defendants Joseph C. Roell, M.D., Petra Garibay, L.V.N., and James Reagan, M.D., filed a motion for summary judgment, which the magistrate judge denied. The magistrate judge's order confirmed that "[b]y order of reference entered December 30, 1997, this case was referred to the undersigned to conduct all further proceedings, including entry of final judgment, in accordance with 28 U.S.C. §636(c)(1)." Pet. App. 26a. At no point did any of these defendants, or Withrow, object to the magistrate judge's representation of

[3] The district-court docket sheet reflects that Withrow previously executed a consent form at the *Spears* hearing, but that form is not in the record. J.A. 1; *see also* R.821.



her authority—or her ability to rule on the defendants' dispositive motion. Similarly, when the defendants moved for reconsideration of their motion for summary judgment—and the magistrate judge signed the order denying reconsideration, J.A. 3; R.302—no party questioned the magistrate judge's authority to make that ruling.

At a subsequent status conference, the magistrate judge addressed the need to obtain consent from a newly added defendant.[4] J.A. 18-19. The magistrate judge informed counsel for the newly added defendant, who was not represented by the Attorney General's Office, that "your client has the right to not consent to my jurisdiction and I don't know what your position is on that. I'm a Magistrate Judge and both, all of the other parties have consented to my jurisdiction." J.A. 18. Again, Defendants Roell, Garibay, and Reagan did not dispute the magistrate judge's statement regarding consent, and neither did Withrow.

Withrow's claims against Roell, Garibay, and Reagan proceeded to trial before a jury, with the magistrate judge presiding and Withrow representing himself. On the first day of trial, the magistrate judge informed the jurors: "In this case—or in any civil case in which both parties consent to my jurisdiction, I do have a civil jurisdiction to hear civil jury trials and that's what we have scheduled this morning." Pet. App. 27a. Consistent with all prior proceedings, no party objected to the magistrate judge's authority.

[4] This added defendant, Danny Knutson, settled with Withrow before trial, mooting the issue of his consent.

After hearing the evidence, the jury returned a unanimous verdict for Roell, Garibay, and Reagan, and the magistrate judge ordered the entry of final judgment in their favor. Pet. App. 28a. Withrow appealed, *pro se*, but prior to briefing the Fifth Circuit remanded the case, *sua sponte*, for the limited purpose of determining whether all parties had consented to trial before the magistrate judge. Pet. App. 12a-13a. The remand order noted that the record contained written consent by Withrow and Defendant Reagan, but not the other defendants. Pet. App. 13a. Accordingly, the Fifth Circuit instructed the district court "to determine whether the parties consented to proceed before the magistrate judge and, if so, whether the consents were oral or written." *Id.*

On remand, Defendants Roell, Garibay, and Reagan filed written consent in the district court, expressly stating their "consent to have this case heard by the United States Magistrate Judge . . . for all purposes, including entry of judgment and jury trial." Pet. App. 22a. They also expressly confirmed "that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." *Id.*

The magistrate judge prepared a memorandum and recommendation for the district court, finding that Defendant Reagan was the only defendant who timely filed written consent.[5] Regarding Defendants Roell and

[5] The magistrate judge's order for service of process had directed each defendant to answer and to file a statement as to whether they consented to the jurisdiction of a United States Magistrate Judge. J.A. 12-13; Pet. App. 17a. Defendant Reagan, then represented by private counsel, filed an answer and a separate statement consenting to trial before the magistrate judge. *See* J.A. 2-3. Defendants Roell and Garibay, both represented by an assistant attorney general, filed answers that neglected to include a statement regarding consent. At the time of remand, all three defendants, now represented by the same assistant attorney general, filed a written statement confirming their consent to proceed before the magistrate judge at all times prior and subsequent to entry of judgment. Pet. App. 22a.



Garibay, the magistrate judge determined that "by their actions they clearly implied their consent to the jurisdiction of a magistrate." Pet. App. 19a. Nonetheless, the magistrate judge deemed such actions insufficient because "implied consent does not confer jurisdiction" and Fifth Circuit precedent precludes curing that defect through belated, express consent. *Id.*[6]

Defendants objected to the magistrate judge's report, but the district court adopted her findings and conclusions, agreeing that "Defendants Roell and Garibay did not expressly consent before trial" and that "belated consent is insufficient to cure this jurisdictional defect." Pet. App. 14a (citing *Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1108 (CA9 1999)).

The Fifth Circuit agreed. Despite Withrow's and Defendant Reagan's express, pretrial, written consent to proceed before the magistrate judge—and the express, post-judgment consent of Defendants Roell and Garibay—the Fifth Circuit determined that the magistrate judge lacked jurisdiction to try the case and to direct entry of judgment on the jury's verdict. This error, in the Fifth

[6] The magistrate judge also determined that Roell and Garibay had not orally consented at hearings, Pet. App. 17a, and the Fifth Circuit held that this finding was not clearly erroneous. Pet. App. 4a-5a.

Circuit's view, required it to vacate the judgment and to remand the matter for a new trial. Pet. App. 10a-11a.

Acknowledging that the Seventh and Eleventh Circuits have repeatedly held post-judgment consent effective under 28 U.S.C. §636(c), the Fifth Circuit rejected these decisions as "contrary to the statute." Pet. App. 5a-10a. Like the district court, the Fifth Circuit referenced the Ninth Circuit's refusal to consider belated consent in *Hajek*, Pet. App. 6a, and aligned itself with that court.

In rejecting the Seventh and Eleventh Circuits' approach—under which belated, express consent cures technical defects in §636(c) referrals—the Fifth Circuit recognized that its repudiation of post-judgment confirmatory consent imposes significant costs: "Our holding that consent must be pre-trial requires, unfortunately, that this matter be re-tried at the expense of the parties and the judicial system." Pet. App. 10a.

## SUMMARY OF ARGUMENT

In authorizing magistrate judges to conduct civil trials pursuant to 28 U.S.C. §636(c), Congress sought to promote judicial efficiency and increase access to courts by providing an alternative forum for expedient resolution of civil suits. Congress made consent the lynchpin of magistrate judges' authority, but it insisted only that consent be voluntary, not that parties convey consent in a particular manner.

Both the text of the statute and its legislative history confirm that Congress's goal was to combat coercion, not formalize consent. Yet, the Fifth Circuit displaced the statute's flexible terms with a rigid construction of consent



that prohibits parties from expressly confirming—post-judgment—their voluntary and knowing decision to proceed before a magistrate judge. In this case, that formalistic rule defeats all parties' trial expectations, nullifies a jury verdict, and burdens the federal docket by sending the parties back to relitigate claims already adjudicated on the merits. This perverse result is not commanded by the statute, and it defeats Congress's efficiency goals.

The evolution of the Federal Magistrates Act as a whole, and of the civil-trial provisions in §636(c) in particular, support a construction of consent that permits parties to provide express, post-judgment confirmation of their voluntary decision to proceed before a magistrate judge. Such a rule enables parties to retain the benefit of their §636(c) bargain and conserves judicial and litigant resources—which furthers the objectives of the Act. Moreover, post-judgment confirmatory consent satisfies §636(c)'s voluntariness requirements because it rests on two consistent demonstrations of consent: first, an express post-judgment statement; and, second, pre-judgment conduct that clearly evidences consent. In conjunction, these two forms of consent unambiguously establish a magistrate judge's authority to preside over a civil trial and to direct entry of judgment.

In rejecting post-judgment confirmatory consent, the Fifth Circuit rested its decision on a misconception that §636(c) consent is a jurisdictional issue. But statutory consent requirements solely implicate the authority of the magistrate judge, not the subject-matter jurisdiction of the district court. Accordingly, any defect in a §636(c) referral is not a jurisdictional error requiring *sua sponte* investigation, and an appellate court should not question consent—

and unnecessarily overturn jury verdicts and final judgments—when no party protests that the magistrate judge proceeded without that party's consent.

## ARGUMENT

### I. A MAGISTRATE JUDGE HAS AUTHORITY UNDER 28 U.S.C. §636(C) TO TRY A CASE AND DIRECT ENTRY OF JUDGMENT WHEN PARTIES PROCEED IN A MANNER CONSISTENT WITH CONSENT AND EXPRESSLY CONFIRM THEIR CONSENT POST-JUDGMENT.

The Federal Magistrate Act of 1979 expanded the role of magistrate judges in the federal judicial system by empowering them to exercise civil case-dispositive authority. Pub. L. No. 96-82, §2(2), 93 Stat. 643, 643 (codified as amended at 28 U.S.C. §636(c)). Congress provided that, "[u]pon the consent of the parties," a magistrate judge "may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves." *Id.*

To protect individual litigants' rights and the integrity of the Article III district court, Congress hinged magistrate judges' case-dispositive authority on two factors: (1) the parties' consent; and (2) a special designation by the district court. *See id.* Congress included a consent requirement because litigants proceeding under §636(c) would be waiving their right to proceed before an Article III judge. *See, e.g., Peretz v. United States*, 501 U.S. 923, 931 n.8 (1991); S. REP. NO. 96-74, at 4 (1979); *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R. 1046 & H.R. 2202 Before the Subcomm.*



*on Courts, Civil Liberties, & the Admin. of Justice, of the House Comm. on the Judiciary*, 96th Cong. 375-80 (1979) [hereinafter "*1979 Hearings*"] (report of U.S. Department of Justice, Office for Improvements in the Administration of Justice (Jan. 19, 1978) [hereinafter "D.O.J. Report"]).

Although the Act specified the need for parties' consent, Congress did not require consent to be given in a particular form. Instead, §636(c) reflects Congress's concern that consent—however given—be voluntary. *See* Pub. L. No. 96-82, §2(2), 93 Stat., at 643 ("Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of consent.") (codified at 28 U.S.C. §636(c)(2)).

In this case, all parties knowingly and voluntarily proceeded before the magistrate judge, who adjudicated dispositive motions, presided over the jury trial, and directed entry of judgment on the jury's verdict—without a single objection from any party. The Fifth Circuit, however, erroneously concluded that all of the litigants' and magistrate judges' efforts were void because two defendants did not file written consent forms prior to entry of judgment. Pet. App. 8a-10a. Moreover, the Fifth Circuit held that the parties who had not previously executed consent forms could not cure that technical defect by confirming their consent, in writing, post-judgment. *Id.*[7]

[7] By contrast, the Seventh and Eleventh Circuits consistently accept various forms of post-judgment consent to effectuate magistrate judges' civil-trial authority under §636(c). *See, e.g., Gen. Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1496-97 (CA11 1997) (holding post-judgment consent effective when parties withdrew their request for a new trial, thereby accepting the magistrate judge's

The Court should reject the Fifth Circuit's formalistic construction of §636(c). Prohibiting post-judgment confirmatory consent is inconsistent with the structure, purpose, and policy of the Federal Magistrates Act, and it impedes Congress's objectives in creating the civil-trial provisions in §636(c). When, as in this case, all parties voluntarily proceed through judgment in a manner consistent with consent—and the parties who previously neglected to memorialize consent do so, in writing, post-judgment—the magistrate judge has full authority under §636(c), and an appellate court should respect the final judgment entered in those proceedings.

### A. The Plain Terms of §636(c) Encompass All Types of Voluntary Consent and Conspicuously Omit Limitations on Form.

In construing §636(c), the Court should "start, as always, with the language of the statute." *Williams v.*

authority to enter judgment); *Am. Suzuki Motor Corp. v. Bill Kummer, Inc.*, 65 F.3d 1381, 1385 (CA7 1995) (accepting statement of consent in party's supplemental appellate filing); *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1185 (CA7 1987) (relying on parties' joint stipulation to magistrate judge's authority filed weeks after entry of the appealed order); *see also* Pet. 9-11 (detailing the Seventh and Eleventh Circuits' holdings on post-judgment consent).

When post-judgment consent is offered for the first time on appeal, the Ninth Circuit, like the Fifth, deems that form of consent impermissible under §636(c). *See Hajek*, 186 F.3d, at 1108 & n.9. Unlike the Fifth Circuit, however, the Ninth Circuit has been receptive to post-judgment consent filed in the district court. *See Kofoed v. Int'l Bhd. of Elec. Workers, Local 48*, 237 F.3d 1001, 1004 (CA9 2001) (accepting district-court filing of post-judgment written consent when the party also orally consented prior to the magistrate judge's dispositive ruling).



*Taylor*, 529 U.S. 420, 431 (2000). Under §636(c), a full-time magistrate judge may exercise case-dispositive authority "[u]pon the consent of the parties." 28 U.S.C. §636(c)(1). Beyond that, the statute "does not require a specific form or time of consent or even that it be in writing." *King*, 825 F.2d, at 1185; *see also* 28 U.S.C. §636(c)(1). The statute merely instructs district courts to enact local rules that "protect the *voluntariness* of the parties' consent." 28 U.S.C. §636(c)(2) (emphasis added). Similarly, it requires judges to advise parties that they may withhold consent without adverse consequences. *See id.* No such directives exist, however, regarding the form of parties' consent. *See id.*

This omission is telling. Other consent provisions in the Act demonstrate that Congress specifies how consent must be given when it intends to condition magistrate judges' authority on the form of parties' consent. A prime example appears in §636(c) itself, which contains a distinct consent procedure for trial before magistrate judges who are not full-time judicial officers. *See* 28 U.S.C. §636(c)(1). Such part-time magistrate judges may exercise civil-trial authority only "[u]pon the consent of the parties, *pursuant to their specific written request*." *Id.* (emphasis added).

Congress imposed no such written-consent requirement, however, on full-time magistrate judges like the magistrate judge who presided over Withrow's trial. *See id.* To stretch the written-consent requirement for part-time judicial officers to cover full-time magistrate judges would defeat the consent distinctions drawn by Congress in the plain text of §636(c)(1). *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

In the criminal context, as well, Congress specifies how consent must be given when it intends to condition magistrate judges' authority on the form of consent. Prior to 1996, for example, Congress authorized magistrate judges to conduct misdemeanor trials only if a criminal defendant signed "written consent to be tried before the magistrate that explicitly waives both a trial before a judge of the district court and any right to trial by jury that he may have." Federal Magistrates Act, Pub. L. No. 90-578, §302, 82 Stat. 1107 (1968) (codified as amended at 18 U.S.C. §3401(b)). Although Congress continued to hinge magistrate judges' misdemeanor trial authority on consent after 1996, Congress relaxed the requirements of 18 U.S.C. §3401 to permit consent "made in writing or orally on the record." Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, §202(a)(1)-(2), 110 Stat. 3847, 3848-49 (1996) (amending 18 U.S.C. §3401(b)). And Congress eliminated the consent requirement altogether regarding petty offenses. *Id.*; *see* Federal Courts Improvement Act of 1999, Pub. L. No. 106-518, §203, 114 Stat. 2410, 2414 (2000) (codified at 18 U.S.C. §3401(b)); S. REP. NO. 104-366, at 27-28 (1996).

As these criminal provisions demonstrate, Congress has adopted diverse approaches to consent in different magistrate-judge contexts. And Congress knew how to require specific forms of consent when it intended to do so. *See, e.g.*, 18 U.S.C. §3401(b); *see also* 28 U.S.C. §636(c)(1) (regarding part-time judicial officers). For purposes of full-time magistrate judges' authority under §636(c), however,



"Congress did not write the statute that way." *Russello*, 464 U.S., at 23 (citation omitted).

It is significant that Congress chose not to use the form of parties' consent as a constraint on full-time magistrate judges' case-dispositive authority. *See* 28 U.S.C. §636(c)(1). The Fifth Circuit was not free to limit that broad grant of authority by supplementing the statute with formalistic requirements that unjustifiably impede §636(c) referrals.

In light of the generality of §636(c)'s consent requirement, the Court should construe the statute in a manner consistent with the flexibility inherent in its terms. *Cf. Peretz*, 501 U.S., at 932 (reasoning that the "generality of the category of 'additional duties'" assignable to magistrate judges under §636(b)(3) "indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process"). Because post-judgment consent confirms a party's voluntary decision to proceed before a magistrate judge, it is a form of consent that complies with the plain terms of §636(c).

### B. The Established Guideposts for Construing the Federal Magistrates Act—Structure, Purpose, and Policy—Support the Permissibility of Post-Judgment Consent.

In determining the scope of magistrate judges' authority under 28 U.S.C. §636, the Court has "interpreted the Federal Magistrates Act in light of its structure and purpose." *Peretz*, 501 U.S., at 930 n.7 (quoting *Gomez v. United States*, 490 U.S. 858, 863-64 (1989) (citing *United*

*States v. Raddatz*, 447 U.S. 667 (1980), *Mathews v. Weber*, 423 U.S. 261 (1976), and *Wingo v. Wedding*, 418 U.S. 461 (1974))). In addition to using the Act's structure and purpose as guideposts, the Court has construed the Act broadly to "comport[] with the policy behind the Act." *McCarthy v. Bronson*, 500 U.S. 136, 142 (1991).

The structure, purpose, and policy of the Act as a whole—and of §636(c)'s civil-trial-authority provisions in particular—support the validity of post-judgment confirmatory consent. Permitting parties to provide express, post-judgment confirmation of their voluntary decision to proceed before a magistrate judge effectuates parties' expectations, conserves judicial and litigant resources, and furthers Congress's overarching goals of improving judicial efficiency and increasing access to courts through the Federal Magistrates Act.

### 1. The structure and purpose of the Act reflect Congress's intent to improve judicial efficiency and increase access to courts.

In 1968, Congress passed the Federal Magistrates Act in response to the "ever-growing workload of the U.S. district courts." H.R. REP. NO. 1629, at 4255 (1968); *see also* Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968). By creating an "upgraded system of judicial officers below the level of the district judge," Congress hoped to "increas[e] the overall efficiency of the Federal judiciary, while at the same time providing a higher standard of justice at the point where many individuals first come into contact with the courts." H.R. REP. NO. 1629, at 4257.



Since the federal magistrate system's inception in 1968, Congress consistently has amended the Act to expand magistrate judges' authority. In 1976, for example, Congress clarified magistrate judges' authority to conduct evidentiary hearings on habeas corpus petitions. *See* Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729 (1976) (codified at 28 U.S.C. §636(b)(1)(B)). That amendment was a direct response to *Wingo v. Wedding*, 418 U.S. 461 (1974), in which the Court held that Congress had not authorized magistrate judges to conduct such hearings under the Act. *See* H.R. REP. NO. 94-1609, at 5, 11 (1976); *see also, e.g., Raddatz*, 447 U.S., at 674 (discussing Congress's legislative overruling of *Wingo*); Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 354 (1979) (same). The 1976 amendments also expanded magistrate judges' pretrial authority in other respects, expressly authorizing them to hear and determine non-dispositive matters referred by a district judge and to provide reports and recommendations on case-dispositive motions. *See* Pub. L. No. 94-577, 90 Stat., at 2729 (codified at 28 U.S.C. §636(b)(1)(A)-(C)). By encouraging "innovative experimentations" in the use of magistrate judges, Congress hoped to improve the "efficiency and the quality of justice in the Federal courts." H.R. REP. NO. 94-1609, at 12.

In 1979, Congress added the consensual, case-dispositive-authority provisions of §636(c) to add "flexibility to the Federal judicial system" and to establish "a supplementary judicial power designed to meet the ebb and flow of the demands made on the Federal judiciary." H.R. REP. NO. 96-287, at 2 (1979); McCabe, *supra*, at 343 (quoting H.R. REP. NO. 95-1364, at 5 (1978)). This new "flexible judicial resource" was designed to help district

judges "cope with the vastly varying and ever-changing conditions of the district courts." H.R. REP. NO. 95-1364, at 13.

Additionally, by empowering magistrate judges—with parties' consent—to rule directly on dispositive motions, to conduct trials, and to direct entry of judgments, §636(c) "create[d] a vehicle by which litigants can consent, freely and voluntarily, to a less formal, more rapid, and less expensive means of resolving their civil controversies." H.R. REP. NO. 96-287, at 2; *see also* McCabe, *supra*, at 343 (quoting H.R. REP. NO. 95-1364, at 5). Through this new vehicle, Congress aimed "to improve access to the Federal courts," Pub. L. No. 96-82, 93 Stat., at 643, provide relief to overburdened district judges, and "prevent inattention to a mounting queue of civil cases pushed to the back of the docket." S. REP. NO. 96-74, at 4.[8]

Congress's desire to facilitate §636(c) referrals prompted another round of amendments in 1990. Whereas the 1979 Act had prohibited judges from inquiring whether parties wished to avail themselves of a magistrate judge's civil-trial authority under §636(c), *see* Pub. L. No. 96-82, §2(2), 93 Stat., at 643, the 1990 amendment removed that

[8] The courts of appeals have uniformly upheld the constitutionality of magistrate-judges' §636(c) authority. *See* MAGISTRATE JUDGES DIVISION OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES 148-50 (3d ed. 1999) [hereinafter "INVENTORY OF DUTIES"] (collecting cases). In this case, no party ever questioned the constitutionality of §636(c) in the courts below and, therefore, that issue was not passed upon by the district court or the Fifth Circuit. Nor did the petition for writ of certiorari present this question for the Court's review. *See* Pet. i; Reply to Br. Opp'n 7-9.



communication barrier. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, §308(a)(2), 104 Stat. 5089, 5112 (1990) (codified at 28 U.S.C. §636(c)(2)). Congress amended §636(c)(2) to permit both district judges and magistrate judges to "advise the parties of the availability of the magistrate judge"—provided that judges also "advise the parties that they are free to withhold consent without adverse substantive consequences." *Id.*

The 1990 amendment reflected Congress's increased confidence in magistrate judges' performance and its decreased concern that coercion might infect the voluntary-consent process required to invoke magistrate judges' case-dispositive authority under §636(c). *See* S. REP. NO. 104-366, at 28 (noting, in discussing the 1990 amendment, that "Congress demonstrated that it is comfortable with the quality and competence of magistrate judges and less concerned about coerced consent when it relaxed the provisions of 28 U.S.C. §636(c) governing litigant consent to civil trials by magistrate judges").

The 1990 amendment also reflected Congress's recognition of "[t]he need for the court system to have greater flexibility in utilizing judicial resources." H.R. REP. NO. 101-734, at 27 (1990). As the 1990 House report explained, "[t]his need is particularly acute in handling the expanding civil caseload of federal courts. Liberalizing the civil case consent procedures furthers the goal of efficient and maximum utilization of judicial resources." *Id.* By relaxing the terms of the consent provisions in §636(c), Congress afforded parties greater flexibility in their decisionmaking process and more opportunities to reap the efficiency benefits flowing from magistrate judges' exercise of case-dispositive authority. *See id.*

Congress's effort to build greater flexibility into §636(c)'s consent procedures yielded immediate results. The year before the 1990 amendment, magistrate judges disposed of 5,571 civil cases with the consent of the parties, including 438 jury trials and 581 bench trials. *See* Philip M. Pro & Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, 44 AM. U. L. REV. 1503, 1527-28 (1995). After the relaxed consent procedures took effect, those numbers significantly increased. In 1994, for example, magistrate judges handled 7,835 civil-consent cases, including 912 jury trials and 831 bench trials. *Id.*, at 1528.[9]

Magistrate judges not only resolve an increasing number of civil cases, but now also possess contempt powers to further their authority under §636(c). Congress amended §636 in 2000 to allow magistrate judges to punish resistance to orders issued in cases referred pursuant to §636(c). Pub. L. No. 106-518, §202, 114 Stat., at 2412-13 (codified at 28 U.S.C. §636(e)).

Through each of these amendments to the Federal Magistrates Act, Congress bolstered magistrate judges'

[9] In recent years, magistrate judges have shouldered an even heavier civil caseload. In 1999, magistrate judges disposed of 11,320 civil-consent cases (850 jury trials and 648 bench trials); in 2000, that number increased slightly to 11,481 (750 jury trials and 550 bench trials); and, in 2001, civil-consent cases totaled 12,024 (590 jury trials and 489 bench trials). ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, tbl. S-17 (2001). Of course, these statistics represent only a fraction of magistrate judges' total duties, which also include, for example, §636(b) referrals. In 2001, magistrate judges handled 873,948 matters in the federal district courts. *See id.*



authority in an effort to assist district courts in managing ever-expanding dockets and to countermand civil backlog that impedes litigants' access to courts. Indeed, this Court's "decisions have continued to acknowledge the importance Congress placed on the magistrate's role." *Peretz*, 501 U.S., at 928. As the Court observed in *Peretz*, "the system created by the Federal Magistrates Act has exceeded the highest expectations of the legislators who conceived it," with magistrate judges accounting for "a staggering volume of judicial work." *Id.*, at 928 n.5 (citation omitted). "Given the bloated dockets that district courts have now come to expect as ordinary, the role of the magistrate in today's federal judicial system is nothing less than indispensable." *Id.*, at 928 (citation omitted).

It would compromise magistrate judges' indispensable role—and thwart both Congress's efficiency goals and litigants' expectations—to divest magistrate judges of case-dispositive authority whenever a party voluntarily proceeds under §636(c) but neglects to file written pre-judgment consent. *Cf., e.g., Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 56 (1983) (explaining that statutes should not be interpreted "to produce a result at odds with the purposes underlying the statute" but rather "in a way that will further Congress' overriding objective"). To exalt form over substance and preclude post-judgment confirmatory consent would contravene congressional intent and impede the judicial efficiencies achieved through the enactment and evolution of the Federal Magistrates Act.

**2. The purpose of §636(c)'s consent requirement is to prohibit coercive referrals, not impose technical constraints on magistrate judges' civil-trial authority.**

In construing §636(c), the Court should look not only to Congress's overarching efficiency and access goals, but also to Congress's intent in conditioning magistrate judges' §636(c) authority on all parties' consent. Because the term "consent" is unaccompanied by explanatory language, the legislative history is particularly relevant. *See, e.g., United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132, 139 (1989) (considering legislative history and purpose when statutory language was not dispositive). And, as evidenced by the legislative history of the 1979 and 1990 amendments, Congress's purpose in requiring consent was to prevent coercion in §636(c) referrals.

The legislative history of the Federal Magistrate Act of 1979—which established magistrate judges' civil case-dispositive authority—is replete with discussions about the voluntariness of consent, but it specifies no particular form that consent must take. The Joint Explanatory Statement of the Committee of Conference to the House and Senate is particularly instructive:

> "[T]he *voluntary* consent of the parties is required before a civil action may be referred to a magistrate for final decision. . . . The conferees felt that because of the possibility of coercion a strong warning should remain in the legislation that neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference. . . . [R]ules of the court must include procedures to *protect the voluntariness, knowingness, and willingness* of the consent. . . . [O]nce pretrial proceedings have commenced before a district judge or magistrate, the parties could consent to trial by a magistrate before either of these judicial officers. Of course, they also could return to the clerk's office and file their consent there. Again, in this circumstance, no coercion is to be tolerated." S. CONF. REP. NO. 96-322, at 7-8 (1979) (emphasis added).



Other discussions of voluntariness abound. And all focus on preventing coercion, not formalizing consent. *See, e.g.*, S. REP. NO. 96-74, at 5 ("The bill clearly requires the voluntary consent of the parties as a prerequisite to a magistrate's exercise of the new jurisdiction. The committee firmly believes that no pressure, tacit or expressed, should be applied to the litigants to induce them to consent to trial before the magistrates."); H.R. REP. NO. 96-287, at 2 (1979) ("The bill makes clear that the knowing and voluntary consent of the parties is required before any civil action may be referred to a magistrate; no coercion will be tolerated.").

Similarly, the legislative history of the 1990 amendment—which relaxed communication barriers between litigants and judges on the issue of consent—reiterates Congress's concern that consent be voluntary. The House report on the 1990 legislation, for example, notes that pre-1990 consent procedures—under which "judicial officers may not attempt to persuade or induce any party to consent to reference of a civil matter to a magistrate"—too often left litigants uninformed about the option of proceeding before a magistrate judge and "effectively frustrated the intent of the 1979 amendments to the Federal Magistrates Act which authorized magistrates to try civil consent cases." H.R. REP. NO. 101-734, at 27. In response, the 1990 amendment balanced the need to protect the voluntariness

of litigants' consent with the need to facilitate the exercise of magistrate judges' case-dispositive authority:

> "The right of a litigant to have his case heard by an Article III judge remains paramount. Under the present Act, judicial officers are restricted from informing parties of their opportunity to have a civil matter referred to a magistrate because of concerns that judges would coerce parties to accept a reference to a magistrate. Those concerns have not been borne out in the decade since the 1979 revisions. The amendment safeguards the right of a civil litigant to trail [*sic*] by an Article III judge by requiring judges and magistrates to advise parties of their freedom to withhold consent to magistrate jurisdiction without fear of adverse consequences. The amendment thus provides a proper balance between increased judicial flexibility and continued protection of litigants from possible undue coercion." *Id.*

Had Congress been concerned about the formalities of consent it could have amended the Act to require parties to execute written, pre-judgment consent as a precondition to magistrate judges' case-dispositive authority. But Congress did not. *See supra* Part I.A. Instead, the 1990 amendment took the opposite approach, "[l]iberalizing the civil case consent procedures" to "further[ ] the goal of efficient and maximum utilization of judicial resources." H.R. REP. NO. 101-734, at 27.



### 3. The Court should construe §636(c)'s consent requirement broadly to comport with the policy behind the Federal Magistrates Act.

In construing other provisions of 28 U.S.C. §636, the Court has interpreted the statute to "comport[ ] with the policy behind the Act." *McCarthy*, 500 U.S., at 142. In *McCarthy*, for example, the Court broadly construed 28 U.S.C. §636(b)(1)(B), which authorizes magistrate judges to conduct preliminary assessments of prisoner suits challenging "conditions of confinement." *Id.*, at 142-44. In interpreting the statutory phrase "conditions of confinement" to include not only systemic complaints, but also single-episode incidents, the Court noted that its reading would enable district courts to refer a greater number of prisoner suits to magistrate judges. *Id.*, at 142-43. Emphasizing that Congress's "central purpose" in enacting §636(b)(1)(B) was "to authorize greater use of magistrates to assist federal judges 'in handling an ever-increasing caseload,'" *id.*, at 142 (quoting S. REP. NO. 94-625, at 2 (1976)), the Court explained that broad construction of §636(b)(1)(B) was consistent with congressional intent "because it will allow referral of a broader category of cases." *Id.*, at 143.

Similarly, in *Peretz*, the Court adopted a broad construction of §636(b) in furtherance of the policy behind the Federal Magistrates Act. 501 U.S, at 933-34. Specifically, the Court held that the "additional duties" clause of §636(b)(3) permits magistrate judges to conduct felony *voir dire* with a defendant's consent. *Id.*, at 934. In reaching this conclusion, the Court noted that its reading of the statute "will permit the courts, with the litigants' consent, to 'continue innovative experimentations' in the use of

magistrates to improve the efficient administration of the courts' dockets." *Id.*

In construing §636(c), the Court should look not only to the policy behind the Act as a whole, but also to the policies underlying that section in particular. The evolution of §636(c) confirms Congress's intent to promote judicial efficiency by increasing the flexibility of §636(c) consent procedures. *See, e.g.*, H.R. REP. NO. 101-734, at 27; H.R. REP. NO. 96-287, at 2 (1979); H.R. REP. NO. 95-1364, at 13; McCabe, *supra*, at 343. Because "[l]iberalizing the civil case consent procedures furthers the goal of efficient and maximum utilization of judicial resources," *id.*, the requirements of §636(c) should be construed broadly to further that policy choice.[10]

[10] A broad construction of consent also would accommodate variations in local rules implementing §636(c)—an aspect of the referral process that Congress instructed district courts to administer. *See* 28 U.S.C. §636(c)(2) (requiring that local procedures guard against coercion); *see also* S. REP. NO. 96-74, at 14. All district courts now designate full-time magistrate judges to exercise civil-consent authority pursuant to §636(c). INVENTORY OF DUTIES, *supra*, at 141. And, due to the statute's inherent flexibility, courts employ a wide array of referral procedures. *See, e.g.*, C.D. CAL. R. 6.6.3 (requiring filed consent at least thirty days before final pretrial conference unless district court approves later consent); D. COLO. R. 72.2(D) (requiring filing of written consent within ten days after discovery cut-off or forty days after last-filed pleading in non-discovery cases); D.D.C. R. 73.1(b) (requiring filing of signed notice of consent prior to entry of a pretrial order); D. OR. R. 72.1 advisory note 1 (including magistrate judges in random assignments of all civil filings); N.D. ALA. R. 73.2(c) (assigning case to magistrate judge if parties consent within ninety days after case is filed); *see generally* MAGISTRATE JUDGES DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FACILITATING THE USE OF MAGISTRATE JUDGES' CIVIL CONSENT AUTHORITY 1-3 (June 2002) (reviewing variations in district courts' direct-referral practices, under which cases are assigned to magistrate judges prior to parties' consent) [hereinafter "FACILITATING THE USE OF MAGISTRATE JUDGES' CIVIL CONSENT AUTHORITY"].



Permitting post-judgment consent is consistent with Congress's policy choice in §636(c). By contrast, construing the statute to preclude post-judgment consent impedes Congress's efficiency and access goals—squandering judicial and litigant resources expended on a trial that now must be duplicated because of a technical defect in the form of two defendants' consent. *See* Pet App. 10a (requiring that "this matter be re-tried at the expense of the parties and the judicial system").

Previously, the Court has rejected constructions of the Act that undermine Congress's objectives. In *McCarthy*, for example, the Court declined to adopt a reading of the Act that would have multiplied proceedings and "generate[d] additional work for the district courts." 500 U.S., at 143 (determining that a narrow construction of the term "conditions of confinement" in §636(b)(1)(B) would prompt new litigation over which prisoner suits qualified for

Under varying local procedures, missteps are inevitable, as occurred in this case. Withrow failed to secure all parties' consent, which is a responsibility assigned to plaintiffs under the Southern District of Texas's local rules. *See* S.D. TEX. GEN. ORDER No. 80-5 art. III.B.2. (Br. Opp'n App. 7a); *see also* S.D. TEX. GEN. ORDER NO. 2001-6 art. III.B. Additionally, Defendants Roell and Garibay neglected to sign locally prescribed consent forms. S.D. TEX. GEN. ORDER NO. 80-5 art. III.B.2. Finally, the district judge departed from local practice by referring the case before any defendants had been served, much less consented. *See id.* art. III.B.3. These technical defects in local procedures, however, did not negate the reality of the parties' voluntary decision to proceed before the magistrate judge. And, it is that voluntary decision that triggers a magistrate judge's authority under §636(c). *See* 28 U.S.C. §636(c)(1). The Court should construe §636(c) in a manner that is consistent with the statutory design, linking magistrate judges' authority to the voluntariness of consent, *see* 28 U.S.C. §636(c)(1), while treating the formalities of consent as a local, administrative issue to be determined by district courts. *See id.* §636(c)(2).

referral under that provision). In *United States v. Raddatz*, as well, the Court rejected a construction of the Act that "would largely frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts." 447 U.S. 667, 676 n.3 (1980) (declining to construe §636(b)(1) to require district judges to re-hear evidence offered at a suppression hearing conducted by a magistrate judge).

The Court similarly should reject a hypertechnical view of §636(c) that would increase civil backlog and unnecessarily generate additional work for federal courts by voiding final judgments and jury verdicts whenever a party neglects to file express pretrial consent. *See McCarthy*, 500 U.S., at 142; *Raddatz*, 447 U.S., at 676. Because such an approach is neither required by §636(c)'s plain terms, nor consistent with the policy behind the Federal Magistrates Act, the Court should hold, instead, that parties may cure technical defects in §636(c) referrals by providing post-judgment confirmation of their pretrial consent.

### C. Post-Judgment Confirmatory Consent Satisfies §636(c)'s Voluntariness Requirement and Furthers the Federal Magistrates Act's Access and Efficiency Goals.

Rather than utilize the established guideposts of structure, purpose, and policy in construing the Federal Magistrates Act, *see supra* Part I.B, the Fifth Circuit based its construction of §636(c) on two unwarranted assumptions that are unrelated to congressional intent: first, that post-judgment consent impermissibly implies consent from a party's conduct; and, second, that defining consent solely by *pretrial* statements eliminates "gamesmanship." Pet.



App. 8a-10a. The Fifth Circuit, however, was mistaken on both counts. Moreover, these misconceptions yielded a construction of §636(c) that is inconsistent with Congress's objectives.

In providing magistrate judges with consensual, case-dispositive authority, Congress sought to ensure the voluntariness of parties' consent while also facilitating referrals under §636(c). *See supra* Part I.B. Section 636(c) should be interpreted in light of these two goals because, as in all statutory-construction cases, congressional intent is paramount. *See Chickasaw Nation v. United States*, 534 U.S. 84, ___, 122 S.Ct. 528, 535 (2001).

#### 1. In construing §636(c), the Court should not ignore the practical realities of district-court proceedings that reflect parties' voluntary consent.

When, as in this case, all parties are fully informed that the magistrate judge intends to exercise case-dispositive authority—and the parties voluntarily proceed before the magistrate judge with the knowledge and expectation that she can rule on dispositive motions, conduct trial, and direct entry of a final judgment—the magistrate judge acts "upon the consent of the parties" in accordance with §636(c). 28 U.S.C. §636(c).

The "upon the consent of the parties" language in §636(c) does not require an immediate, written expression of consent. *See King*, 825 F.2d, at 1185 (noting that while some courts insist on "a clear statement by the parties,"

that requirement is "without basis in the statute").[11] Rather, that language prohibits referrals to magistrate judges against the parties' wishes.

No party, including Withrow, has ever maintained that the referral of this case to the magistrate judge was against the parties' wishes. Nor has any party denied consenting to the magistrate judge's authority or suggested that consent was coerced. And the record contains no indication that each party's decision to proceed before the magistrate judge was not voluntarily made.

Although Defendants Roell and Garibay did not expressly confirm consent until after judgment, Pet. App. 22a, that does not mean they did not previously consent to proceed before the magistrate judge—to whom the case already was referred at the time of service. Pet. App. 21a. To the contrary, the magistrate judge noted, on remand from the Fifth Circuit, that these defendants "by their actions . . . clearly implied their consent to the jurisdiction of a magistrate." Pet. App. 19a.

[11] Federal Rule of Civil Procedure 73, which complements §636(c), instructs parties to file consent forms with the district-court clerk. FED. R. CIV. P. 73; *see also id.* Form 34. But a magistrate judge's civil-trial authority derives from the statute, *see* 28 U.S.C. §636(c), not this rule. Thus, many courts, including the Fifth Circuit, have not enforced strict compliance with the rule when the record otherwise documents consent. *See, e.g., Kofoed*, 237 F.3d, at 1004 (referencing Rule 73 but deeming adequate pre-judgment oral consent confirmed by post-judgment written consent); *Kadonsky v. United States*, 216 F.3d 499, 502 (CA5 2000) (accepting consent of party who did not sign the form officially recognized by Rule 73 because "he did sign a document evincing his willingness to proceed before a magistrate judge"), *cert. denied*, 531 U.S. 1176 (2001); *Silberstein v. Silberstein*, 859 F.2d 40, 43 (CA7 1988) (referencing Form 34 and expressing a preference for, but not requiring, written consent). *But see N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc.*, 996 F.2d 23-24 (CA 1993) (emphasizing Rule 73's literal requirements). The Judicial Conference Committee on the Administration of the Magistrate Judges System has suggested that Rule 73 be amended to eliminate the written consent requirement. *See* COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM, SUPPLEMENT TO THE LONG RANGE PLAN FOR THE MAGISTRATE JUDGES SYSTEM: CIVIL AND FELONY CONSENT AUTHORITY OF MAGISTRATE JUDGES 4 (1993 & Supp. 1994) [hereinafter "LONG RANGE PLAN"].



Under these circumstances, when no party claims coercion and the record evidences only indicia of consent, it is consistent with §636(c)'s voluntariness requirement to infer consent from the proceedings below—particularly when, as here, the record also contains each party's pre- or post-judgment express consent. *Cf. Archie v. Christian*, 808 F.2d 1132, 1137 (CA5 1987) (en banc) (Higginbotham, J., specially concurring) (reasoning that when parties knowingly proceeded to trial before a magistrate judge but failed to execute written consent, and "no parties objected to the magistrate's having presided over the trial, although they were well aware that a magistrate had presided. . . . [i]n every real sense they consented").

### 2. Post-judgment consent is a type of express consent that satisfies §636(c).

In addition to evidencing consent through their actions in the district court, all parties in this case provided express, written consent to the magistrate judge's authority—whether pre-trial (Withrow and Defendant Reagan) or post-judgment (Defendants Roell and Garibay). Pet. App. 20a, 22a; J.A. 2; *see Smith v. Shawnee Library Sys.*, 60 F.3d 317, 321 (CA7 1995) (recognizing that even "[a] late-submitted consent is 'an unequivocal representation that the magistrate was acting with the parties'

consent'") (citation omitted). There was no need to imply consent from any of the parties' conduct, as the Fifth Circuit erroneously reasoned, because the record contained express statements of each party's agreement to proceed before the magistrate judge.

Assuming, *arguendo*, that implied consent is inconsistent with §636(c),[12] that reading of the statute does not

[12] Courts generally have agreed with the Fifth Circuit's view that consent under §636(c) must be express, not implied. *See, e.g., Kofoed*, 237 F.3d, at 1004; *Rembert v. Apfel*, 213 F.3d 1331, 1334 (CA11 2000); *N.Y. Chinese TV Programs*, 996 F.2d, at 24; *King*, 825 F.2d, at 1185; *Ambrose v. Welch*, 729 F.2d 1084, 1085 (CA6 1984) (per curiam). Notwithstanding such aversion to implied consent, the Judicial Conference Committee on the Administration of the Magistrate Judges System has endorsed "opt out" systems in which cases are randomly referred to magistrate judges and a party must expressly object to the referral if they wish to proceed instead before an Article III judge. LONG RANGE PLAN, *supra*, at 3-4. In practice, many district courts now assign cases directly to magistrate judges on a random basis, and the magistrate judges retain those cases unless the parties do not consent. *See* FACILITATING THE USE OF MAGISTRATE JUDGES' CIVIL CONSENT AUTHORITY, *supra*, at 1 (noting that at least twenty-two districts have added magistrate judges to the "draw" or "wheel" for assignment of civil cases).

Because §636(c) demands only that consent be voluntary, such opt-out and automatic-referral procedures are not inherently inconsistent with the statute or with Congress's intent—provided parties truly have a meaningful opportunity to object. *See* H.R. REP. NO. 101-734, at 27 (balancing the need to ensure the voluntariness of a party's decision to waive their right to an Article III judge with the need to facilitate civil referrals). If a case is referred to a magistrate judge with the parties' full knowledge that the referral encompasses trial and entry of judgment—and the parties voluntarily proceed without objection and without demanding that the case be heard by an Article III judge—the magistrate judge acts, for all practical purposes, with the parties' consent. *Cf. Peretz*, 501 U.S., at 936-37 (holding that a criminal defendant who fails to object to a magistrate judge conducting felony *voir dire* under §636(b)(3) waives the right to demand the presence of an Article III district judge at the selection of his jury); *cf. also*



preclude post-judgment consent. For example, the Seventh Circuit—like the Fifth Circuit—rejects implied consent under §636(c); but that court correctly recognizes that express post-judgment consent is not "implied." *King*, 825 F.2d, at 1185 (recognizing that "while many courts (including our own) refuse to infer consent from the parties' behavior, and some have even insisted (without basis in the statute) on 'a clear statement by the parties,'" post-judgment consent "*is* a clear statement by the parties" that satisfies those concerns) (citations omitted).

Post-judgment consent may confirm what previously was implicit in a party's conduct, but that does not render it implied consent. *See id.* Rather, it is an express statement of the voluntary consent that preceded entry of judgment but was never articulated on the record.

Post-judgment confirmatory consent satisfies §636(c)'s voluntariness requirements because it rests on two consistent demonstrations of consent: first, an express post-judgment statement; and, second, pre-judgment conduct that clearly evidences consent. In combination, these two forms of consent unambiguously establish a magistrate

*Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 849-50 (1986) (noting that party's decision to proceed before the commission rather than pursue relief in state or federal court "constituted an effective waiver" of any right to trial before an Article III court on a counterclaim). Of course, even under an inferred-consent rule, parties could dispute consent and argue that whatever manifestations of consent appear on the record resulted from coercion, not a voluntary agreement to proceed before the magistrate judge. Regardless, in this case the Court need not decide whether opt-out procedures, random case assignments, or inferred consent satisfy §636(c) because all parties expressed their consent on the record—either pretrial or post-judgment.

judge's authority to preside over a civil trial and to direct entry of judgment.

In this case, the written, post-judgment consent filed in the district court by Defendants Roell, Garibay, and Reagan not only was consistent with their consensual conduct before the magistrate judge, but also was an unequivocal declaration of express consent:

> "Defendants Roell, Garibay, and Reagan consent to have this case heard by the United States Magistrate Judge in the United States District Court for the Southern District, Corpus Christi Division for all purposes, including entry of judgment and jury trial. Defendants Roell, Garibay, and Reagan further notify the Court that they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." Pet. App. 22a.

This express statement unconditionally confirmed these defendants' consent to proceed before the magistrate judge in accordance with §636(c), and it should have settled any question of the magistrate judge's authority to enter final judgment.

### 3. Congressional intent, not game theory, should guide the Court's construction of §636(c).

Under the Fifth Circuit's analysis of §636(c), speculation about litigant manipulation replaced congressional intent as a defining principle in construing the statute. Pet. App. 9a-10a. Game theory, however, is not a reliable statutory-construction tool.



Requiring pretrial consent does not eliminate gamesmanship, as the Fifth Circuit erroneously reasoned. *Id.* The potential for "strategy games" exists under any consent rule. *Smith*, 60 F.3d, at 321. If courts "did not accept late consents," for example, "a litigant who knew that the *other* side had not consented could wait until judgment and raise the problem only if he lost." *Id.*[13]

Indeed, the Fifth Circuit has encountered such strategic maneuvers. In *Caprera v. Jacobs*, 790 F.2d 442 (CA5 1986) (per curiam), the court reluctantly vacated a magistrate judge's dismissal of plaintiffs' §1983 suit when all original parties consented to the magistrate judge's civil-trial authority but a defendant added by plaintiffs in an amended complaint neglected to file a form. After the magistrate judge granted defendants' Rule 12(b)(6) motion and dismissed plaintiffs' claims, the plaintiffs protested his authority, citing the added defendant's failure to file written consent. As the Fifth Circuit bemoaned:

> "We recognize that it is unfair to allow a party, as the plaintiffs did here, to remain silent on the jurisdictional problem while awaiting the magistrate's decision, knowing it will get a second chance from the appellate court should the magistrate rule against the party. This court does not favor giving such parties 'a second bite at the

[13] An "inferred consent" rule based on parties' conduct presumably would eliminate gamesmanship because parties could no longer withhold express consent, voluntarily proceed to trial before a magistrate judge, and then determine whether to consent post-judgment depending on the outcome of the case. It would be more protective of Congress's voluntariness concerns, however, to require parties to expressly confirm their consent—either pretrial or post-judgment.

apple.' However, when the objection is to jurisdiction, it cannot be waived." *Id.*, at 445 (citations omitted).[14]

Whether a court allows post-judgment consent or limits consent to pretrial statements, opportunities will exist for litigants to game the magistrate-judge system. Rather than "write a treatise on game theory," *Smith*, 60 F.3d, at 321, the Court should apply established statutory-construction principles and construe §636(c) in light of the structure, purpose, and policy behind the Federal Magistrates Act. *See Peretz*, 501 U.S., at 930 n.7; *McCarthy*, 500 U.S., at 142. And, under this framework, Congress's efficiency and access goals militate in favor of a broad construction of §636(c) that permits post-judgment consent. *See supra* Part I.B.

## II. SECTION 636(C) NEITHER IMPLICATES SUBJECT-MATTER JURISDICTION NOR REQUIRES APPELLATE COURTS TO NULLIFY JUDGMENTS, *SUA SPONTE*, FOR LACK OF CONSENT.

At the time Withrow appealed the adverse jury verdict and judgment, no party disputed the existence of consent. Yet the Fifth Circuit raised the issue *sua sponte*—prompted by its misunderstanding of the role consent plays in a §636(c) referral: "When the magistrate judge

[14] Technical defects in consensual referrals implicate a magistrate judge's authority, not the subject-matter jurisdiction of the district court. *See infra* Part II. The *Caprera* plaintiffs objected to the magistrate judge's authority post-judgment, both in a Rule 60(b) motion and on appeal, placing the issue of consent squarely before the Fifth Circuit. But when, as in this case, no party contests consent, an appellate court should not raise the issue *sua sponte*. *See id.*



enters final judgment in a suit pursuant to 28 U.S.C. §636(c), lack of consent and defects in the order of reference are jurisdictional errors that cannot be waived." Pet. App. 12a-13a.

The absence of §636(c) consent, however, does not equate with a lack of subject-matter jurisdiction—which does require *sua sponte* consideration. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997). Consent is a predicate for the exercise of civil-trial authority under §636(c), but it does not provide a basis for subject-matter jurisdiction in the district court. Accordingly, any defect in a §636(c) referral is not a jurisdictional error requiring *sua sponte* investigation, and an appellate court should not question consent—and unnecessarily overturn jury verdicts and final judgments—when no party protests that the magistrate judge proceeded without that party's consent.

### A. Consensual Referrals Under §636(c) Do Not Implicate Subject-Matter Jurisdiction.

The trial court's subject-matter jurisdiction in this case was premised on federal-question jurisdiction, *see* 28 U.S.C. §1331, not any provision of the Federal Magistrates Act. The Fifth Circuit's identification of an irregularity in the statutory-referral procedure did not—and could not—nullify the federal question that conferred subject-matter jurisdiction over Withrow's §1983 suit.

In *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, Justice Kennedy—then writing for the Ninth Circuit en banc court—recognized the distinction between subject-matter jurisdiction and §636(c) consent.

725 F.2d 537, 543 (CA9 1984) (en banc). As Justice Kennedy explained, parties who invoke a magistrate judge's authority under §636(c) consent to waive the right to proceed before an Article III judge. *See id.* But they do not consent to subject-matter jurisdiction—which cannot be conferred by agreement. *See id.* (explaining that jurisdiction emanates from the subject matter of the suit, not parties' consent pursuant to §636(c)). And just as consent under §636(c) cannot create jurisdiction that does not otherwise exist, *see id.*, nor can the absence of consent destroy jurisdiction that independently stems from a federal question in the suit. *See* 28 U.S.C. §1331; *see also Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1041-42 (CA7 1984) (clarifying that a §636(c) consensual referral "is not an expansion of the subject matter jurisdiction of the federal courts but rather the parties' choice of the forum in which the suit, for which federal jurisdiction clearly exists, is to be litigated"); *Wharton-Thomas v. United States*, 721 F.2d 922, 929-30 (CA3 1983) (concluding that consent issues under §636(c) relate "not to the jurisdiction of the district court as an entity, but to the judicial officer within the court who conducted the trial").

Although this Court previously has described magistrate judges' authority under §636(c) in terms of "expanded jurisdiction," it did so while discussing the scope of statutorily authorized duties, not *subject-matter* jurisdiction. *Gomez*, 490 U.S., at 870 (contrasting Congress's explicit grant of consensual civil-trial authority under §636(c) with delegation of felony-trial duties under §636(b)(3)). Similarly, while the word "jurisdiction" appears in §636's caption—"Jurisdiction, powers, and temporary assignment"—the statute's provisions address magistrate judges' authority, not subject-matter jurisdiction. *See* 28 U.S.C.



§636. Such uses of the word "jurisdiction" are not surprising because, as Justice Scalia has observed, "'jurisdiction' . . . is a many-hued term":

> "[The Court] used it in *Gomez* as a synonym for 'authority,' not in the technical sense involving subject-matter jurisdiction. The judgment here is the judgment of the District Court; the relevant question is whether *it* had subject-matter jurisdiction; and there is no doubt that it had. The fact that the court may have improperly delegated to the Magistrate a function it should have performed personally goes to the lawfulness of the manner in which it acted, but not to its jurisdiction to act." *Peretz*, 501 U.S. at 953 (Scalia, J., dissenting) (citation omitted).[15]

Although *Peretz* involved the delegation of *voir dire* supervision in a felony trial pursuant to §636(b)(3), not a referral to a magistrate judge for trial and entry of judgment pursuant to §636(c), Justice Scalia's reasoning resonates in both contexts. Even under a §636(c) referral, the judgment entered "is the judgment of the District Court," *id.*, because "the jurisdiction exercised by magistrates at trial is clearly that of the Article III federal district court." D.O.J. Report, *supra*, at 375; *1979 House Hearings*, *supra*, at 385 (Judicial Conf. of the U.S., Comm. on the Admin. of the Fed. Magistrate Sys. (Jan. 30-31, 1978), Comments on S. 1613—The Magistrate Act of 1977) [hereinafter "Judicial Conf. Comments"] (same); *see also* INVENTORY OF DUTIES, *supra*, at 1; *cf.* 28 U.S.C. §636(c)(1)

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[15] Justice Scalia's dissent was the only opinion in *Peretz* to discuss the distinction between statutory authority and subject-matter jurisdiction—an analysis the majority did not disclaim.

(indicating that a magistrate judge exercising consensual civil-trial authority is an instrument of the district court "he serves").[16]

When Congress expanded magistrate judges' authority by enacting §636(c)'s civil-trial provisions in 1979, Congress understood that it was not remodeling subject-matter jurisdiction. *See* McCabe, *supra*, at 369 (documenting that in passing the 1979 Act, "Congress concluded that the jurisdiction exercised by the magistrate is the jurisdiction of the district court itself"). As a Department of Justice report submitted to Congress explained, "[i]t is the court, not the judge, to which these doctrines of subject-matter jurisdiction apply":

> "The magistrate exercises no independent jurisdiction. . . . The magistrate exercises only that subject-matter jurisdiction which is authorized by the Constitution, delegated to the district court by Act of Congress, and designated by the court itself to be available through its magistrate with the consent of the parties. . . . Therefore, jurisdiction remains in the district court, which exercises its jurisdiction through the medium of the magistrate. The defendant consents merely to an alteration in trial procedure, not to a transfer of jurisdiction from the district court to another tribunal." D.O.J. Report, *supra*, at 376 (citation omitted).

[16] Drawing on Justice Scalia's reasoning in *Peretz*, the Tenth Circuit has correctly recognized that defects in statutory referral procedures under §636 are not jurisdictional errors. *See Clark v. Poulton*, 963 F.2d 1361, 1367 (CA10 1992) (citing *Peretz*, 501 U.S., at 953 (Scalia, J., dissenting)); *see also In re Griego*, 64 F.3d 580, 583 (CA10 1995). Although these decisions concerned defects in §636(b) referrals—pursuant to which a district-court judge enters final judgment—the Tenth Circuit's reasoning did not depend on that distinction. *See Clark*, 963 F.2d, at 1363-64, 1366-67 (reviewing the statutory structure of §636 as a whole before distinguishing a magistrate judge's statutory authority from subject-matter jurisdiction). Moreover, the Tenth Circuit's approach is consistent with other circuits' distinctions between subject-matter jurisdiction and statutory consent requirements under §636(c). *See Geras*, 742 F.2d, at 1041-42; *Pacemaker*, 725 F.2d, at 543; *Wharton-Thomas*, 721 F.2d, at 929-30.



Other contemporaneous congressional sources echo this understanding that subject-matter jurisdiction resides in the district court and is merely exercised by a magistrate judge. *See* H.R. REP. NO. 96-287, at 8 ("[T]he magistrate is an adjunct of the United States District Court, appointed by the court and subject to the court's direction and control. When the magistrate tries a case, jurisdiction remains in the district court and is simply exercised through the medium of the magistrate."); Judicial Conf. Comments, *supra*, at 385 (same); *see also* McCabe, *supra*, at 369 (chronicling legislative discussions of jurisdiction while considering the 1979 Act).

Accordingly, when consent to trial before a magistrate judge is invalid, the only risk it poses is "to the authority of the court or the rights of the litigants"—not subject-matter jurisdiction. D.O.J. Report, *supra*, at 376. The Fifth Circuit's contrary view, which equates lack of §636(c) consent with lack of subject-matter jurisdiction, fundamentally misunderstands the relationship between the magistrate judge and the district court. Because §636(c)'s consent requirements implicate a personal right that parties can waive—not a jurisdictional constraint on the district court—appellate courts should not question

consent, *sua sponte*, when all parties proceed in a manner consistent with consent and also expressly confirm their consent either pretrial or post-judgment. *See Archie*, 808 F.2d, at 1137 (Higginbotham, J., specially concurring) (reasoning that when parties knowingly proceed to trial before a magistrate judge but fail to execute written consent, "I would neither find this violation of the rule to be 'jurisdictional' and not waivable, nor so substantial that we ought to consider it, *sua sponte*").

### B. Appellate Courts Should Not Vacate Final Judgments Based on Referral Defects to Which No Party Objects.

Because a jurisdictional approach to consent is not required by §636(c), the Fifth Circuit had no basis to vacate the final judgment and void the jury verdict. Yet the Fifth Circuit took that unwarranted action—squandering judicial and litigant resources when no party claimed the magistrate judge proceeded without that party's consent.

The Fifth Circuit's mischaracterization of a referral defect as a fatal jurisdictional flaw provides litigants like Withrow a litigation windfall. Withrow expressly consented to the magistrate judge's authority, never alleged lack of consent by defendants, and proceeded to try his case to a jury that found against him. The Fifth Circuit's jurisdictional recasting of consent, however, extends Withrow a second bite at the apple. That result—which unjustly subjects the parties and district court to the burdens of a new trial—should not stand. *See Peretz*, 501 U.S., at 935 & n.12 (explaining that a defendant may consent to a magistrate judge's authority to conduct *voir dire* in a felony case and that "defendants may waive the



right to a judicial performance of other important functions, including the conduct of the trial itself in misdemeanor and civil proceedings"); *cf. McDowell v. United States*, 159 U.S. 596, 598-602 (1895) (holding that any defect in statutorily authorized intracircuit judicial assignment was immunized by the *de facto* officer doctrine); *Ball v. United States*, 140 U.S. 118, 128 (1891) (determining that irregularity in the temporary appointment of district judge to particular district did not subject the judge's acts to collateral attack).

Any irregularity in the referral of this case to the magistrate judge did not deprive the district court of its subject-matter jurisdiction over Withrow's suit; and it should not have spurred a *sua sponte* inquiry by the appellate court. Under no circumstances, moreover, did the alleged consent defect require "that this matter be retried at the expense of the parties and the judicial system." Pet. App. 10a.[17]

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[17] Other courts have examined consent *sua sponte* but framed the inquiry in terms of their own appellate jurisdiction, not the subject-matter jurisdiction of the district court. *See* 28 U.S.C. §1291. These courts conclude that, absent consent, the magistrate judge had no authority to enter a final judgment; therefore, no reviewable order exists on appeal. *See, e.g., McNab v. J. & J. Marine, Inc.*, 240 F.3d 1326, 1327-28 (CA11 2001); *Kofoed*, 237 F.3d, at 1003-04. This justification for *sua sponte* consideration is also flawed. When a party appeals a judgment rendered by a magistrate judge pursuant to §636(c), that party brings a valid judgment within the meaning of §1291 to the court of appeals. *See* 28 U.S.C. §636(c)(1), (3). A magistrate judge's signature on that document should not render the judgment suspect or provoke doubts about appellate jurisdiction as might arise, for example, in an appeal from an interlocutory order. When a final judgment facially satisfies §1291, appellate courts should not delve, *sua sponte*, beneath its surface, foraging for a defect that has not drawn an objection and does not implicate the subject-matter jurisdiction of the trial court.

The Fifth Circuit's *sua sponte* investigation of consent furthered no jurisdictional interest, nor any voluntariness concerns under §636(c). Because all parties voluntarily proceeded before the magistrate judge, who exercised the federal-question jurisdiction of the district court, the final judgment was valid and entitled to respect on appeal. *See* 28 U.S.C. §636(c)(1), (3).

## CONCLUSION

The Court should reverse the judgment of the Fifth Circuit.

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UNITED STATES CODE
TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE
PART III—COURT OFFICERS AND EMPLOYEES
CHAPTER 43—UNITED STATES MAGISTRATE JUDGES

§636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgements, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b) (1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for

summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial[1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is

[1] So in original. Probably should be "post-trial".



made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

(2) A judge may designate a magistrate judge to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate judge to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrate judges shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate judge or a part-time United States magistrate judge who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate judge may exercise such jurisdiction, if such magistrate judge meets the bar membership requirements set forth in section 631(b)(1)

and the chief judge of the district court certifies that a full-time magistrate judge is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate judge in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate judge designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.



(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate judge under this subsection.

(5) The magistrate judge shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) Contempt authority.—

(1) In general.—A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) Summary criminal contempt authority.—A magistrate judge shall have the power to punish summarily by fine or imprisonment such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) Additional criminal contempt authority in civil consent and misdemeanor cases.—In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish,

by fine or imprisonment, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) Civil contempt authority in civil consent and misdemeanor cases.—In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court. This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) Criminal contempt penalties.—The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) Certification of other contempts to the district court.—Upon the commission of any such act—

(A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or



(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where—

(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii) the act constitutes a civil contempt, the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

(7) Appeals of magistrate judge contempt orders.—The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate judge may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate judge shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate judge so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate judge may perform the verification function required by section 4107 of title 18, United States Code. A magistrate judge may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate judge assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate judge who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate judge in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate judge may receive a salary for such service in accordance



with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 which are applicable to such magistrate judge. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate judge, shall not apply to the recall of a retired magistrate judge under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate judge under this subsection or section 375 of this title unless such retired magistrate judge met such requirement upon appointment or reappointment as a magistrate judge under section 631.